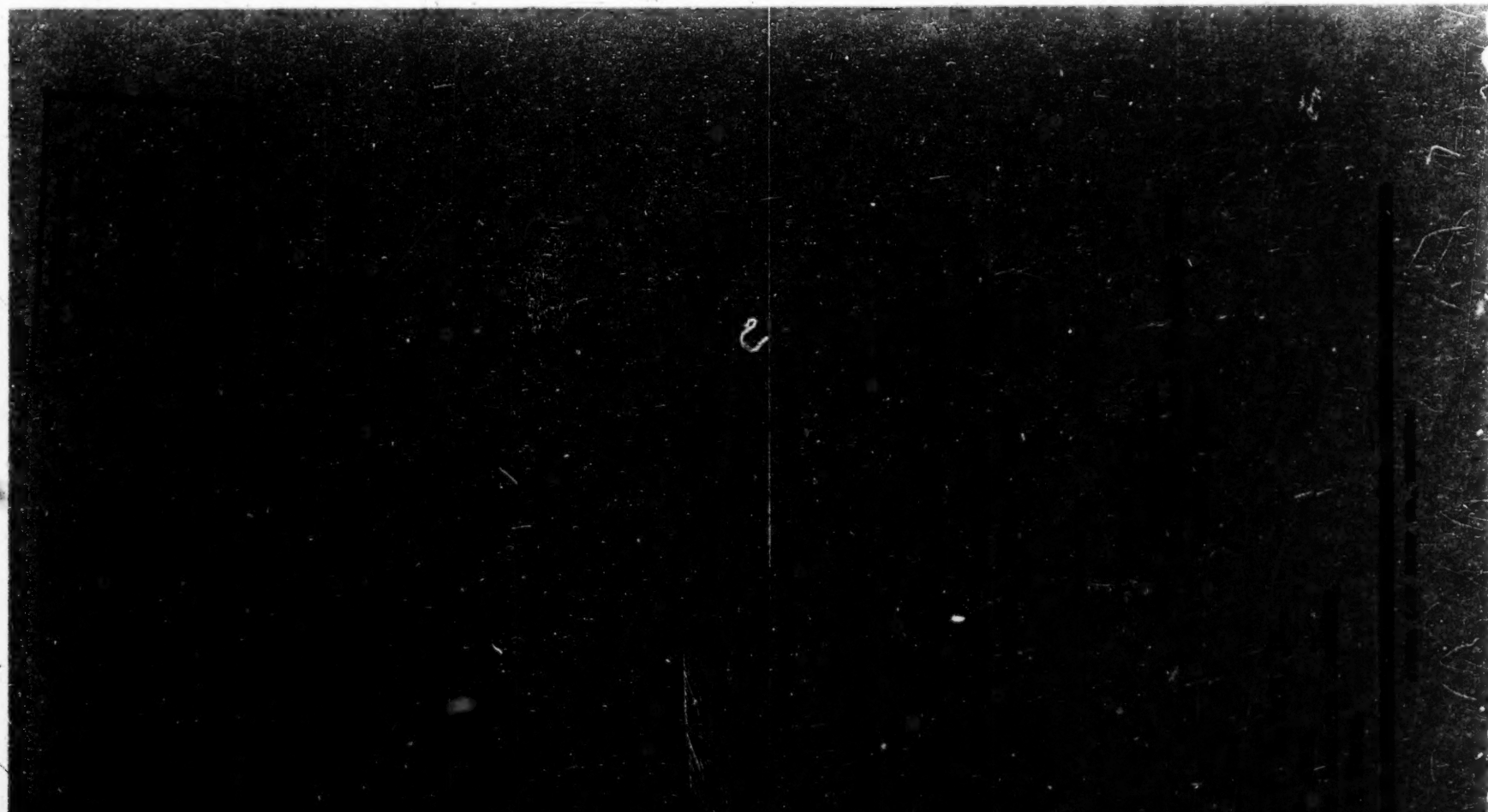

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No._____

AMERICAN FIRE AND CASUALTY COMPANY, *Petitioner*,

v.

FLORENCE C. FINN, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals For the Fifth Circuit

American Fire and Casualty Company, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled and numbered cause on May 17, 1950.

Opinions Below

The Trial Court entered judgment on the verdict of a jury (R. 219); therefore, no opinion was written in the District Court concerning this case. The opinion of the Court of Appeals for the Fifth Circuit (R. 257) is reported

in 181 F. (2d) 845, and a copy thereof is made a part of this Petition as Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on May 25, 1950 (R. 257). Petition for rehearing was denied on June 16, 1950 (R. 275). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Petitioner presents in this case as its ground for review by writ of certiorari, the removal jurisdiction of a District Court of the United States under 28 U. S. C., Section 1441, Act June 25, 1948, c. 646, Sec. 39, 62 Stat. 992, eff September 1, 1948, which repealed prior removal statutes.

Petitioner's position is that the District Court in which this case was tried had no jurisdiction to hear and determine the controversy. The facts, with reference to this point and the legal authorities supporting Petitioner's petition, will be discussed under the heading, "Reasons For Granting the Writ", *infra*.

Question Presented *

Whether a complaint which in substance states alternative theories of recovery, each asking for joint and several relief by a citizen of the State in which suit is commenced against citizen of that same State and two corporate citi-

* Should this petition for certiorari be granted, Petitioner wishes to preserve the following errors committed by both the District Court and Court of Appeals for review and action by this Court when the case is heard upon its merits:

(1) The failure of the Trial Court to grant Petitioner's motion for new trial and the failure of the Court of Appeals, Fifth Circuit, to order such new trial when the record conclusively shows that the jury abused its power by not basing its verdict on the weight of credible evidence before it, but used thoroughly impeached

zens of other States, is removable from a State Court to the United States District Court under the provisions of 28 U. S. C., Section 1441 (b) (c).

Statutes Involved

The pertinent statutes, both Federal and State, are printed in Appendix A, *infra*, page 13.

Statement

This suit is to recover the proceeds of a contract of insurance which was alleged to be either oral or written. It was filed by Respondent, Florence C. Finn, a citizen of Texas, against Petitioner, American Fire and Casualty Company, a corporate citizen of the State of Florida; Indiana Lumbermens Mutual Insurance Company, a corporate citizen of the State of Indiana; and Joe Reiss, a citizen of the State of Texas. It was first filed in the State District Court for Harris County, Texas (R. 6).

This complaint sounds in both contract and tort. It alleges the existence of either oral or written contracts of insurance with all parties to the suit, including the resident agent, Reiss, and then alleges that said Reiss was guilty of certain "wrongful acts" which, as the agent of the com-

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testimony as a basis of its verdict, and the refusal of the Court of Appeals, Fifth Circuit, to inquire into the evidence based upon the erroneous assumption that Article 4929, Revised Civil Statutes of Texas, 1925, making a total loss on a fire insurance policy on real property a liquidated demand for the face amount of the policy, prevented such inquiry when a "Builder's Risk" policy of insurance was involved.

(2) The action of the Trial Court in entering judgment based upon conflicting answers of the jury to material findings sought under Rule 49(a), Federal Rules of Civil Procedure, and the failure of the Court of Appeals to reverse and remand the case for such reason.

panies involved, bound such companies to Respondent in judgment for his wrongful acts (R. 15, 16). When the complaint is analyzed, leaving aside form and getting to the substance of it, it is seen that it states the following causes of action and asks for relief against the persons or corporations named:

1. A contract and tort action against American Fire and Casualty Company, a corporate citizen of Florida, the Indiana Lumbermens Mutual Insurance Company, a corporate citizen of Indiana, and Joe Reiss, a citizen of Texas. Joint and several relief is asked against each defendant (R. 17, 18).

2. A contract and tort action against American Fire and Casualty Company, a corporate citizen of Florida, and Joe Reiss, a citizen of Texas. Joint and several relief is asked (R. 17, 18).

3. A contract and tort action against Indiana Lumbermens Mutual Insurance Company, a corporate citizen of Indiana, and Joe Reiss, a citizen of Texas. Joint and several relief is asked (R. 17, 18).

Thus it is seen that under every theory of recovery advanced by Respondent, joint relief is sought by a citizen of Texas against another citizen of Texas and a citizen of another state.

Under the theory that a "separable controversy" existed between the defendants, and inasmuch as the value involved exceeded the sum of $3,000.00, exclusive of interest and costs, the two corporate defendants, both citizens of states other than Texas, removed the case to the United States District Court (R. 5). Respondent moved to remand the case to the State Court (R. 25), but such motion was denied (R. 33).

The case proceeded to trial with the aid of a jury which rendered its verdict in the form of answers to Special Interrogatories presented to it under Rule 49(a), FEDERAL RULES OF CIVIL PROCEDURE (R. 187), upon which, judgment in the amount of $5,000.00 with interest was rendered against only Petitioner, American Fire and Casualty Company (R. 192). A motion for new trial was filed by Petitioner, which was denied (R. 193), and later a joint motion to vacate the judgment and remand to State Court was filed by Petitioner and the other defendants (R. 226). The Trial Court denied such motion (R. 233). Accordingly, appeal was perfected (R. 233).

The motion to vacate the judgment and remand to the State Court (R. 226), which was filed after the entry of judgment, proceeded upon the theory that "separable controversy" as a basis for removal when a joint and several claim was stated by a citizen of one state against a resident citizen and a non-resident citizen, no longer was valid because of the enactment by Congress of 28 U. S. C. 1441; and upon the authority of BENTLEY V. HALLIBURTON OIL WELL CEMENTING COMPANY, 174 F. (2d) 788 (Court of Appeals, Fifth Circuit), (Appendix C, *infra*, page 19), which opinion was published after the entry of judgment by the Trial Court in the instant case.

The Court of Appeals affirmed the action of the Trial Court on the basis that separate and independent claims, each of which was removable if sued upon alone, were joined with an otherwise non-removable claim; therefore, the entire suit was removable within the meaning of 28 U. S. C. 1441; and further, upon the authority of TEXAS EMPLOYERS' INSURANCE ASSOCIATION V. PELT, 150 F. (2d) 227 (Fifth Circuit, June 21, 1945), which held that where a Workmen's Compensation claimant sought to recover against three different defendants jointly and severally on

essentially the same state of facts, "There was only one cause of action" stated, but separable controversies existed between the defendants (R. 259).

Specifications of Errors to Be Urged

The Court of Appeals, Fifth Circuit, erred:

1. In holding that a District Court of the United States has removal jurisdiction when the claim or right asserted does not arise under the Constitution, treaties, or laws of the United States, and one of the parties in interest, properly joined and served as a defendant, is a citizen of the state in which such suit is brought, because such action violates 28 U.S.C. 1441 (b).

2. In holding that a District Court of the United States has removal jurisdiction of a complaint where claim is made by a resident plaintiff against resident and non-resident defendants, and joint and several relief is asked, because such action violates 28 U.S.C. 1441 (c).

3. In failing to reverse and remand this case because of the Trial Court's failure to exercise its absolute duty, as distinguished from a discretionary duty, to grant Petitioner's motion for new trial when the record affirmatively discloses that the jury abused its power by not basing its verdict on the weight of credible evidence before it, but used thoroughly impeached testimony as a basis of its verdict. The erroneous character of this action by the Court of Appeals is made clearly apparent, because its failure to review the evidence was based upon its unwarranted assumption that a "liquidated demand statute" applied to a policy of "Builder's Risk" insurance.

4. In refusing to reverse the Trial Court because the

judgment entered was based on conflicting answers of the jury to material findings sought under Rule 49 (a), FEDERAL RULES OF CIVIL PROCEDURE.

Reasons for Granting the Writ

1. The decision of the Court below in the case at bar is in direct conflict with the Court's prior decision in the case of BENTLEY v. HALLIBURTON OIL WELL CEMENTING COMPANY, supra. This conflict, while not conceded by the Court, is patently apparent from the holdings made in the two cases. The Court below, in the instant case, has refused to analyze the complaint in the manner it indicated proper in the BENTLEY case, where the Court said that even though the word, "concurrent" was not used as descriptive of the negligent acts of the several defendants, the Court would look beyond the form of the complaint to its substance to determine the legal theories of recovery.

Under the substantive law of Texas, there is no deviation from the holdings that an agent and his principal are jointly liable, both in contract and tort. KIRKPATRICK, ET AL., v. SAN ANGELO NATIONAL BANK, 148 S.W. 362 (Court of Civil Appeals, 1912, no appeal); AETNA CASUALTY & SURETY COMPANY v. LOVE, ET AL., 121 S.W. (2d) 986 (Supreme Court of Texas, 1938).

From the analysis heretofore made of Respondent's complaint, it is submitted that this case is on all fours with the same legal question presented by the BENTLEY case; yet the Court seeks to make a different construction of the complaint filed in order to reach a different legal result.

2. The Court's holding in the instant case conflicts in principle and in theory with its holding in TEXAS EMPLOYERS INSURANCE ASSOCIATION v. FELT, supra, which, to the puz-

zlement of Petitioner, the Court below cited as authority in reaching the result that it did in the instant case.

An anomalous situation is presented by the holdings of the instant case and of the FELT and BENTLEY cases. The opinions in each decision are written by the same Judge, yet no one opinion can be reconciled with the other. That the Felt decision is not authority to sustain the Court in its holding in the instant case, but to the contrary is actually authority for the sustaining of Petitioner's position here presented, can be demonstrated easily. The FELT case was decided prior to the enactment of 28 U.S.C. 1441; thus, the old removal statute which was 28 U.S.C. 71, embodying "separable controversy", was decisive of the issues there involved.

The complaint asks for joint and several relief against three different Workmen's Compensation insurance companies, one of which was a corporate citizen of the State of Texas, the other two being corporate citizens of states other than Texas. The plaintiff was a citizen of the State of Texas. The non-resident defendants removed the case to the District Court of the United States and there judgment was rendered against only the resident defendant. Complaint was then made that the Court had no jurisdiction.

Keeping in mind the change in wording of 28 U.S.C. 71, involving "separable controversy" as a ground for removal, to the wording of 28 U.S.C. 1441, where "a separate and independent claim or cause of action" is the basis of removal, the following holding of the Court in the FELT case conclusively shows that had the Court proceeded on the same theory that it did in the FELT case, removal jurisdiction is not present in the case at bar.

> "In tort cases, plaintiffs have an optional joint right as well as joint remedy; here the optional joinder is

only procedural; the right remains several. *There was only one cause of action, one claim for compensation under the law and the facts, but there were three separate controversies with the defendants as to which of them was bound to pay the amount claimed.* These several controversies, within the rules of pleading, were united in one action and tried together. Two of the controversies were wholly between citizens of different states, and each involved the requisite federal jurisdictional amount; the other was wholly between citizens of the same state, and by itself would not have been removable to the federal court." (Emphasis ours.)

The above holding makes crystal clear the point that where essentially the same facts and legal theories, just as in the case at bar, are set up as the basis of a joint recovery against three different defendants, only one "claim or cause of action" is stated, yet there may be several separable controversies stated.

The conflicting character of these case decisions, all within one circuit, inevitably will keep the decisions of the District Courts and other Courts of Appeals in a state of argumentative discord until "separate and independent claim or cause of action" is distinguished from "separable controversy" by an authoritative decision of this Court.

3. Clearly the question here presented is of extreme importance because it affects all removals from State to Federal Court under a newly enacted statute. The question is of further importance, and the need for judicial construction of the statute clearly shown, because of the conflict and ambiguity created by the provisions of Subsections (b) and (c) of 28 U.S.C. 1441 (Appendix *, *infra*, page 13). The last sentence in Subsection (b) says:

"Any other such action (civil action) shall be re-

movable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought".

When diversity of citizenship is the ground for removal under Subsection (c), one of the parties-defendant against whom a "separate and independent claim or cause of action" is stated, must be a citizen of the state in which the suit is brought. Accordingly, if removal under Subsection (c) is allowed when diversity of citizenship is the sole ground for removal, a head-on conflict with Subsection (b) becomes apparent, because under that Subsection no case can be removed except one involving the Constitution, laws or treaties of the United States where any defendant is a citizen of the state in which the suit is brought.

The only reasonable construction that can be given Subsections (b) and (c), when taken in their entirety, is that the "removable if sued upon alone" language in Subsection (c) applies to all cases in which the ground urged for removal is other than diversity of citizenship. The opinion of the Fifth Circuit in the instant case does not even discuss the problem.

4. The decision of the Court below is clearly erroneous under the terms of either Subsection (b) or (c) of 28 U.S.C. 1441, and also violative of the express purpose of the revisors of the Judicial Code to the effect that a decrease in the volume of Federal litigation should result from the enactment of 28 U.S.C. 1441.

While no decision of this Court has been found construing 28 U.S.C. 1441, Act June 25, 1948, c. 646, § 39, 62 Stat. 992, eff. September 1, 1948, this Court has in the past clearly defined the law of removal of causes under prior statutory provisions in such a manner as to indicate approval of Petitioner's position.

It was held in the case of POWERS v. CHESAPEAKE & OHIO RR. Co., 169 U.S. 92, 42 L. Ed. 673, 18 S. Ct. Rep. 264, that a plaintiff may bring suit against as many people as he wishes asking for joint relief, and no separate controversy which will authorize removal exists, even if the defendants file separate answers and set up separate defenses and allege that they are not jointly liable.

In ALABAMA GREAT SOUTHERN RR. CO. v. H. C. THOMPSON, 200 U.S. 206, 26 S. Ct. 161, 50 L. Ed. 441, the Court held that the existence of a separable controversy, which will warrant removal, must be determined by the record in the State Court at the time of the filing of petition for removal; thus indicating again that if the plaintiff chooses to make allegations entitling him to joint relief, such is his prerogative.

Again the case of PULLMAN CO., ET AL., v. JENKINS, ET AL., 305 U.S. 534, 83 L. Ed. 334, holds that in actions sounding in both contract and tort the question of the joint character of the claim is determined from the plaintiff's pleadings in the State Court at the time of the filing of the removal petition.

Because of the conflict and ambiguity created by Subsections (b) and (c) of 28 U.S.C. 1441, and of the failure of the Court below to consider Subsection (b) and to erroneously apply Subsection (c), Petitioner reiterates that a compelling need exists for a construction by this Court of the present removal statute which became effective only on September 1, 1948.

Historically speaking, this Court has always sought to resolve ambiguities in statutes. This is especially true of the removal statutes in existence prior to the present one. Removal jurisdiction of every removal statute has always been a question of sufficient importance to be brought to the

attention of this Court. This importance is magnified because of the ambiguity existing in our present statute.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

28 UNITED STATES CODE 1441

Section 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

Article 4929. REVISED CIVIL STATUTES OF TEXAS 1925

Policy a liquidated demand.

A fire insurance policy, in case of a total loss by fire of property insured, shall be held and considered to be a liquidated demand against the company for the full amount of such policy. The provisions of this article shall not apply to personal property. Acts 1879, p. 83.

APPENDIX B

In the

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 13080

American Fire & Casualty Company, Appellant,
versus
Florence C. Finn, Appellee

Appeal from the United States District Court for the Southern District of Texas

(May 17, 1950)

Before HOLMES, McCORD, and RUSSELL, Circuit Judges.

HOLMES, *Circuit* Judge: This action was instituted by appellee, in a state court of Texas, against two fire insurance companies, each a non-resident corporation, and an individual citizen of Texas, doing business as Joe Reiss Insurance Agency. On the joint petition of the two non-resident defendants, the entire case was removed to the court below, where, after plaintiff's motion to remand had been overruled, a trial was had, and judgment rendered for the appellee against only the appellant, no formal judgment appearing to have been entered for or against the other two defendants.

After the judgment had been rendered against it in the court below, the appellant moved to vacate the same and to remand the cause to the state court on the ground that

it had been improperly removed, the movant relying upon *Bentley v. Halliburton Oil Well Cementing Co.*, 174 F. (2d) 492. The appellant's inconsistency in causing the removal and then complaining about it, is deemed immaterial, since the alleged defect in jurisdiction is not merely modal but goes to the substantive question of federal jurisdiction. *Wabash R. R. Co. v. Barbour*, 73 Fed. 513; *Tillman v. Russo Asiatic Bank*, 51 F. (2d) 1023. It is true that separable controversies as a ground of removal have been abolished, as held in the *Bentley* case, *supra*, and that appellant in its petition technically erred in alleging a separable controversy as a ground of removal. Counsel claims to have been uninformed (when his removal petition was filed on Sept. 14, 1948) as to the amendment in the removal statute that became effective Sept. 1, 1948, 28 U. S. C. 1441; but, notwithstanding this error, it appears from the allegations of fact in the complaint and petition to remove that two separate and independent claims, each of which would have been removable if sued upon alone, were joined with an otherwise non-removable claim; and, therefore, the entire suit was removable. Sec. 1441(c).

All three claims are with reference to the total destruction by fire of a single house owned by appellee. She alleged that the fire occurred on May 6, 1948, while appellant's policy of insurance was in full force and effect; but, in the alternative, she pleaded that if mistaken in the foregoing claim, the Indiana Lumbermens Ins. Co. was liable for said loss on another policy issued to her by it for the same amount. Then, in the event she failed to recover against either insurance company, she alleged a claim for the same loss against Joe Reiss, the resident agent of both companies, which was separate and independent of the other two claims. The difference, if any, between separable con-

troversies under the old statute and separate and independent claims under the new one is in degree, not in kind. It is difficult to distinguish between the two concepts,[1] but it is not necessary to attempt it in a case like this, which would be removable under either statute. Under both, the removal jurisdiction of the federal court is broader than its original jurisdiction, and all questions of joinder, nonjoinder, misjoinder, or multifariousness, are for the federal court to determine after removal. We think that the court below correctly overruled appellant's motions to remand. See Rule 20(a) of Federal Rules of Civil Procedure. Cf. *Texas Employers Ins. Ass'n v. Felt*, 150 F. (2d) 227.

Turning to the merits of the case, there was substantial evidence to support the verdict of the jury, and we find no reversible error in the record. The contention of appellant is that the insured fraudulently misrepresented the facts in her application for the policy, in that she grossly overstated the value of the property. In an action at law, issues as to fraud and value are for the jury if there is substantial evidence to support the respective contentions of the parties. A valuation of five thousand dollars for a six-room dwelling, undergoing repairs nearing completion, with a new roof already completed, is not so excessive as to shock the conscience of the court or to evince bias, prejudice, or passion on the part of the jury. This is especially true where, under the law of Texas, there is a liquidated demand under an insurance policy and the parties are presumed to have agreed upon the value of the property to be covered by the policy. Moreover, this was not the first time the Reiss Agency had written insurance upon this property. Joe Reiss

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[1] Any distinction between separate and separable controversies has been said to be sound in theory but illusory in substance. 41 Harv. L. Rev. 1048; 35 Ill. L. Rev. 576.

saw the house in 1947, and was aware of its location. He had an opportunity to see it "a couple of hundred" times since then. He drove near it daily in every direction going to and from his home. He may have been sufficiently alert at all times in representing the interest of the insurer, but after the fire it was too late. As the appellee testified: "After the fire there was nothing but charcoal out there." Under Article 4929 of the Texas Civil Statutes of 1925, a fire insurance policy, in case of a total loss by fire of the property insured, is held and considered to be a liquidated demand against the company for the full amount of the policy, except this article does not apply to personal property. The judgment appealed from is AFFIRMED.

A True Copy:
Teste:

Clerk of the United States Court of
Appeals for the Fifth Circuit.

APPENDIX C

In the

UNITED STATES CIRCUIT COURT OF APPEALS
For the Fifth Circuit

No. 12605

Bentley

v.

Halliburton Oil Well Cementing Co., et al.

HOLMES, Circuit Judge.

This is an action for damages for personal injuries to appellant, a citizen of Texas, who seeks a joint or joint and several judgment against the two appellees, one of which is a Texas and the other a Delaware corporation. The action originated in a state court of Texas, having been filed therein on August 24, 1948. By petition of the non-resident defendant, filed in the court below on September 13, 1948, the suit was removed to the federal court under the provisions of the new Judicial Code, which became effective September 1, 1948. The appellant's motion to remand having been overruled, as well as his motion to dismiss his complaint without prejudice, he declined to proceed further with the prosecution of his suit, which resulted in a final judgment against him with prejudice. Notice of appeal was timely given, and the cause is now here for review.

The wrong and injury asserted by appellant occurred in Texas and the substantive law as to the liability of the alleged joint tort-feasors is governed by the law of that state, under which the liability of one is equal to the liability of all the others. Each is liable for the whole tort and every

part of it. The injured party may sue all jointly or any number less than all; or he may sue each one separately, until full satisfaction for the injury has been obtained. This is true where the negligence of one or more persons concurred in committing the injury, although there was no common design or concerted action among the wrongdoers. They are all jointly and severally liable for all damages resulting from a single injury.

The removal jurisdiction of the United States district courts is broader in some cases and narrower in others than its original jurisdiction; for instance, it is broader in actions under Section 1441(c) and narrower in actions under Section 1445(a) of said Title 28. The real question, then, on this appeal is whether the court below acquired jurisdiction of this suit upon its removal under said Section 1441(c). In other words, did the court below err in overruling appellant's motion to remand the cause to the state court? In the absence of a fraudulent joinder, which is not asserted here, this question turns upon the well pleaded facts alleged in the complaint, which are substantially as follows:

On the morning of February 13, 1948, the appellant was riding as a passenger on a bus of the appellee Houston Transit Company. At the same time, a truck of appellee Halliburton Oil Well Cementing Company was negligently approaching from the rear of said bus. The truck driver negligently failed to observe the presence of the bus, and crashed into the rear of the same with great force and violence, causing serious bodily injuries to the appellant. Separate and specific acts of negligence on the part of both drivers were alleged. The negligence of each was alleged to be a proximate cause of the injury, and the collision was alleged to have resulted from the negligence of the truck driver and the bus driver in causing the two vehicles to

collide. Although the word concurrent was not used in describing the appellee's acts of negligence, it is apparent from the other facts stated in the complaint that the tort resulted directly and proximately from their concurrent negligence. The collision could not have happened without the two vehicles attempting to occupy the same space at the same time; and, when it was alleged that it did happen as a result of the separate acts of negligence of the respective drivers, it followed as a necessary inference of fact that the injury was caused by the concurrent negligence of the appellees. While good pleading may have warranted the alleging of concurrent negligence as an ultimate fact, the absence of such an allegation was not material, since the facts actually alleged constituted the only evidence necessary to prove concurrent negligence as the proximate cause of the injury.

Under the Judiciary Act of 1789, 1 Stat. 73, 79, the grounds of removal were alienage, diversity of citizenship, and claim of right or title to land in litigation under a grant from another state. No right of removal was given where a non-resident was joined as a co-party with a citizen. The pertinent provisions of this act remained in effect without revision or amendment for 77 years. The act of July 27, 1866, 14 Stat. 306, brought into being the right of one or more defendants to remove cases on the now familiar ground of a separable controversy. The act of March 2, 1867, 14 Stat. 558, followed, with the idea of extending further the scope of such jurisdiction; but it was not until the act of March 3, 1875, 18 Stat. 470, that a special category, the controversy within a suit, was introduced into the federal removal statute for the benefit of all non-resident defendants. Then the act of March 3, 1887, 24 Stat. 552, repealed all former acts relating to removal, and

provided that, when there should be a controversy in any suit within its provisions which was wholly between citizens of different states, and which could be fully determined as between them, then either one or more of the defendants actually interested therein might remove the entire suit to the federal court. The act of August 13, 1888, 25 Stat. 433, was a correction and re-enactment of the act of 1887. These acts were expressly repealed by Section 297 of the Judicial Code of 1911, and were re-enacted in all substantial provisions as Section 28 of said code. The provision therein with reference to separable controversies remained in effect without change until September 1, 1948, when Chapter 89, new Title 28, of the United States Code Annotated became effective.

Under the act of 1789, unless all of the defendants were citizens of states different from all of the plaintiffs, the suit was not removable even though it contained separable controversies and separate causes of action against citizens of other states. The doctrine of fraudulent joinder had its inception in the courts, and originally was a judicial pronouncement intended to protect non-resident defendants from any misstatement of fact or misjoinder of parties or causes of action knowingly made by plaintiffs for the purpose of conferring jurisdiction upon or defeating removal to a federal court. In the absence of a fraudulent joinder, the course of removal legislation was this: The whole suit remained in the state court from 1789 to 1866, though it contained separate and separable controversies or causes of action; from 1866 to 1875, the suit was split into two parts, with one part left in the state court and the other removed to the federal court; from 1875 to Sept. 1, 1948, if a separable controversy appeared from the plaintiff's pleadings, the entire suit was removed to the federal court, which determined all questions of joinder, non-joinder, misjoinder,

or multifariousness, and all issues of fact; and the court was required to dismiss or remand in whole or in part as justice required.

Under the new Judicial Code, separable controversies were abolished, as a distinct ground of federal removal jurisdiction, and Section 1441(c) of said code was substituted in lieu thereof. The separable controversy was uprooted, but the soil in which it flourished remains. The difference between the two concepts is one of degree, not of kind; and the basic principles are as applicable now as they were under prior statutes. We are still governed by the local law as to the plaintiff's substantive right and the joint or several character of his claim. The federal authorities are still potent to the effect that the plaintiff has the right to select the forum; to elect whether to sue joint tort-feasors jointly or separately; and to prosecute his own suit in his own way to a final determination. They are also potent to the effect that, if the complaint is filed in good faith, the cause of action, for the purpose of removal, is deemed to be that which the plaintiff has undertaken to make it; that the defendant cannot make separate a cause of action which the plaintiff has elected to make joint; and the same is true as to all other questions with respect to federal jurisdiction and the statutory remedy of removal.

That a separate defense may defeat a joint recovery, but cannot deprive the plaintiff of his right to sue joint tort-feasors jointly, is a federal rule that was announced under the separable-controversy provisions of the old statute, which is still sound and capable of being used in cases under Section 1441(c) of the new code. Other doctrines upon the remedy of removal are put forth in a number of federal decisions that are as applicable in this case as they were under the statute which was in force from 1875 to

1948. In Chesapeake & Ohio Railway Company v. Dixon, 179 U.S. 131, 21 S. Ct. 67, 71, 45 L. Ed. 121, the Supreme Court held, in an action of tort, that concurrent negligence was charged and, therefore, there was no separable controversy. In that case the court also said: "Chicago, Rock Island, etc., Co. v. Martin, 178 U.S. 245, 20 S. Ct. 854, 44 L. Ed. 1055, is another case in which an action for concurrent negligence was held not to present a separable controversy." In Alabama & Great Southern Ry. Co. v. Thompson, 200 U.S. 206, 25 S. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147, the court held that: (1) In the absence of a fraudulent joinder, the right of removal depends upon the allegations of plaintiff's complaint; (2) a railroad company may be sued jointly with its conductor and engineer when liability is predicated solely upon the negligence of its resident employees, even though no separate act of concurrent negligence is charged against the company.

To the same effect is Cincinnati, N. O. & Texas Pacific Ry. Co. v. Bohon, 200 U.S. 221, 26 S. Ct. 166, 50 L. Ed. 448, 4 Ann. Cas. 1152, which was considered by the court at the same time as the Thompson case. It was a suit for the death of a yard brakeman and switchman, who was killed, while uncoupling cars, by the negligence of the engineer. The Company was sued jointly with the engineer, and the former filed its petition to remove on the ground of a separable controversy. The court held that the action for death by negligence was regulated by the constitution and statutes of Kentucky, which made the Company jointly or severally liable for the acts of its servants, and gave the plaintiff the right of election to join the master and servant in one suit; that a separable controversy must be shown upon the face of the declaration; and that a defendant has no right to say that an action shall be several which the plaintiff has elected to make joint. It said that a state has the un-

questionable right to regulate actions for negligence; and that, where it has provided that the plaintiff may proceed jointly or severally, there is nothing in the federal removal statute which will convert an election into a separable controversy, because of the presence of a non-resident defendant, if the plaintiff in good faith and in due course of law elected to sue jointly.

In Wecker v. National Enameling Co., 204 U.S. 176, 27 S. Ct. 184, 187, 51 L. Ed. 430, 9 Ann. Cas. 757, the court analyzed Alabama & Great Southern Railway Co. v. Thompson, 200 U.S. 206, 25 S. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147, and upon the authority of that and previous cases said: "If the complaint is filed in good faith the cause of action, for the purposes of removal, may be deemed to be that which the plaintiff has undertaken to make it." In Illinois Central Railroad v. Sheegog, 215 U.S. 308, 30 S. Ct. 101, 54 L. Ed. 208, the court impliedly held that there was no separable controversy because separate or additional acts of negligence against the Illinois Central were relied on; for instance, neither resident defendant was responsible for the defective engine or cars. This was an additional matter which the non-resident was required to defend, but it did not create a separable controversy. In Southern Railway Co. v. Miller, 217 U.S. 209, 30 S. Ct. 450, 54 L. Ed. 732, the court held that the case was ruled by Alabama & Great Southern R. R. v. Thompson, 200 U.S. 206, 26 S. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147, and it made no difference that the liability of the Railroad Company was statutory and that of the other defendants was at common law.

In Chicago, Burlington & Quincy Railroad v. Willard, 220 U.S. 413, 31 S. Ct. 460, 55 L. Ed. 521, the court held that the plaintiff had the right to elect whether to file a joint action in the state court, and that it was not fraudulent to make it joint, even if the plaintiff did so to prevent removal.

See also Chicago, Rock Island & Pacific Railway Co. v. Schwyhart, 227 U.S. 184, 33 S. Ct. 250, 57 L. Ed. 473; Chicago, Rock Island & Pacific Railway Co. v. Dowell, 229 U.S. 102, 33 S. Ct. 684, 57 L. Ed. 1090; Chesapeake & Ohio Railway Co. v. Cockrell, Administrator, 232 U.S. 146, 34 S. Ct. 278, 58 L. Ed. 544; American Car and Foundry Co. v. Kettlehake, 236 U.S. 311, 35 S. Ct. 355, 59 L. Ed. 594; Chicago & Alton Railroad Co., et al., v. McWhirt, 243 U.S. 422, 37 S. Ct. 392, 61 L. Ed. 826; Mecom, Admr., v. Fitzsimmons Drilling Co., Inc., et al., 284 U.S. 183, 51 S. Ct. 488, 75 L. Ed. 1431; Pullman Company, et al., v. Jenkins, et al., 305 U.S. 534, 59 S. Ct. 347, 83 L. Ed. 334.

The result in Pullman Co. v. Jenkins, supra, was the same as in all similar instances in the Supreme Court where the action was for damages for wrongful death or personal injuries; the case was remanded. The most important part of this decision for present purposes is the holding that the first count of the declaration stated a joint cause of action against all of the defendants. There, as in the case before us, there was one wrong which gave rise to a joint or several cause of action. There, the question was not whether separate suits might have been brought, but whether a joint one would lie. The answer was that it would, and the answer is the same whether we are looking for a separable controversy or a separate and independent claim or cause of action.

The gravamen of appellant's case here consists in the violent collision that caused his injury. Although there was no concert of action between the tort-feasors, the cumulative effect of their several acts was a single, indivisible injury which certainly would not have resulted but for the concurrence of such acts. In these circumstances, the actors may be held liable as joint tort-feasors. A plurality of negligent acts does not establish more than one cause of action so long as their effect is the violation of only one right by a

single wrong. The mere multiplication of grounds of negligence does not result in multiple legal rights. The claim or cause of action, then, is not the negligent act or any group of facts, but the result of these in a legal wrong. Baltimore S. C. Co. v. Phillips, 274 U.S. 316, 321, 47 S. Ct. 600, 71 L. Ed. 1069.

Finally, the separate acts of negligence by each of the appellees were simply component parts of one occurrence, the legal result of which was joint liability on the part of the joint tort-feasors; and joint liability for the whole tort negatives the idea of a separate and independent claim on the part of one of the defendants. The judgment appealed from is reversed, and the cause remanded to the court below with directions to remand the same to the state court.

REVERSED.

APPENDIX "D"

Texas Employers Ins. Ass'n v. Felt
No. 11234
Circuit Court of Appeals, Fifth Circuit
June 21, 1945

HOLMES, Circuit Judge.

This appeal is from a judgment under the workmen's compensation law of Texas, awarding compensation to the appellees for the death of their husband and father. The action was brought by appellees in a Texas state court against three compensation insurance carriers incorporated under the laws of California, Connecticut, and Texas, respectively.

The deceased operated a tractor for various persons engaged in heavy excavation work; they severally rented the machine and severally employed the operator. Because it was uncertain for whom, if anyone, the deceased was working when killed, claims were presented against all three of the parties who were employing him at the crucial period. This action was filed against the several defendants, it being alleged in the alternative that the deceased was employed by each of the three persons to whom the defendants had issued insurance policies.

Upon the petition of one of the non-resident defendants, alleging a separable controversy and other requisite jurisdictional facts, the entire suit was removed to the United States district court. No motion to remand was made; no order for separate trials was sought, and no jurisdictional question was raised until after the return of the verdict. It was then claimed that, since the court below peremptorily instructed a verdict for the two non-resident defendants,

it had no jurisdiction to render judgment against the resident defendant.

Since there was no voluntary dismissal by the plaintiffs, and the peremptory instruction was granted at the request of the non-resident defendants in a trial upon the merits, we think the court below did not lose jurisdiction to dispose of the entire suit. It is true that ancillary jurisdiction fails when jurisdiction over the principal controversy fails, but the principal jurisdiction did not fail in this instance. Only one verdict was rendered; it was against the resident and in favor of the non-resident defendants. Only one judgment was entered; it adjudicated the rights and liabilities of all parties, including the non-resident defendants.

If federal jurisdiction once rightfully attached in this entire suit, it was not so precarious as to depend upon the result of a trial upon the merits. The statutory provision for remand or dismissal at any time, if it shall appear to the satisfaction of the court that the suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, does not give countenance to the idea that the proceeding is to be retained in the federal court until final adjudication on the merits as to the non-resident and then remanded to the state court without deciding the remaining issues between resident parties who were removed thereto in invitum.

A more difficult question is whether the entire suit was removable. This depends upon whether, at the time the petition for removal was filed, there was a single suit containing a separable controversy wholly between citizens of different states or whether there were three separate suits consolidated in a single proceeding. A suit may, consistently within the rules of pleading, embrace several distinct controversies. Separate defenses do not create separable con-

troversies. To entitle one to removal on the ground of a separable controversy, two or more causes of action (one of which would be removable if separately filed) must be united in one suit.

The right of removal on the ground of a separable controversy, if claimed in the mode prescribed by statute, depends upon the case as disclosed by the pleadings in the state court as they stood at the time the petition for removal was filed. The petition ought not to be denied by the state court upon the ground that, in its opinion, the plaintiff has united causes of action which should have been asserted in separate suits. This issue and all questions of misjoinder or multifariousness are matters for the determination of the federal court after the cause is removed thereto. If that court finds that any such objection is well taken, it may require the pleadings to be reformed, and dismissed or remand the entire suit or a portion thereof as justice requires.

All three contracts of employment with the deceased were made and performed in Texas; the injury and death occurred in Texas; the substantive rights and liabilities of the parties were governed by the law of Texas. The Texas procedure relative to alternative actions is identical with Rule 20 of the Federal Rules of Civil Procedure. Therefore, we do not need to distinguish between state and federal procedural law except to say that removal procedure is governed by federal statutes and that after the cause has been removed the procedure is governed by the federal rules.

Rule 20 provides that all persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction or occurrence and if any question of law or fact common to all of them will arise in the action. This rule does not affect jurisdiction, but it regulates procedure where the court already has juris-

diction, and in this case it effectively disposes of any pertinent question as to the misjoinder of defendants who are sued only in the alternative. The option given by Rule 20 to join the defendants in one action did not create joint liability. The permitted joinder is procedural and not substantive.

A better illustration of the procedural advantage of the right to seek alternative relief in one action against several defendants could scarcely be found than the very case before us on this appeal. Without this remedy, three trials before different juries, one in the state court and two in the federal court, might have been necessary. If all the defendants had been citizens of Texas, this suit would have remained in the state court and have been triable in one action; if all the defendants had been non-residents, a single action might have been brought in the federal court, which would have been triable as one suit; from this it follows that there is no procedural reason why a single suit may not be maintained in the federal court if the plaintiff's right to relief arises out of the same transaction and presents a question of law or fact common to all of the defendants. Let us see if the complaint herein meets these requirements for a united action in the alternative.

Immediately prior to his death, the deceased was under separate contracts of employment to operate the tractor for each of his employers. The disputed questions of fact common to all the defendants in this case are: By whom, if anyone, was the deceased employed at the time of his death, and was he fatally injured in the course of his employment? There is no other issue of fact in the case. The determination of this one issue will fix the liability or non-liability of all the defendants. In tort cases, plaintiffs have an optional joint right as well as joint remedy; here the optional joinder is only procedural; the right remains several.

There was only one cause of action, one claim for compensation under the law and the facts, but there were three separate controversies with the defendants as to which of them was bound to pay the amount claimed. These several controversies, within the rules of pleading, were united in one action and tried together. Two of the controversies were wholly between citizens of different states, and each involved the requisite federal jurisdictional amount; the other was wholly between citizens of the same state, and by itself would not have been removable to the federal court.

Because only one recovery can be had, it is suggested that only one controversy is alleged by the plaintiffs in their suit. A reading of the complaint discloses three separate and distinct controversies, one against each of the defendants, alleged in the alternative. All three controversies appear upon the face of the complaint, and were so real and substantial that no defendant interposed a motion to dismiss the action as to itself. The theory that only one controversy is asserted is the antithesis of the contention previously discussed that three separate suits are embraced in a single proceeding. If the complaint contained only one controversy, no part of the suit was removable; if there were three separate suits in a single proceeding, the action should have been divided, two removed to the federal court, and one left in the state court; if there were three controversies in one suit, as we think, the entire suit was removable. In the absence of a fraudulent joinder, the separable-controversy provision of the removal statute is broad enough to embrace alternative separable controversies.

The specific remedy in the alternative given by the new rules of federal procedure affects the exercise of jurisdiction in removal cases, notwithstanding the provision that these rules may not be construed to extend or limit federal juris-

diction. Rule 82 means that the statutory jurisdiction of the district courts of the United States, and the venue of actions therein, were not changed by adoption of the rules; it does not mean that the exercise of federal removal jurisdiction may not be indirectly affected by the choice of remedies afforded plaintiffs. The removal statute does not ignore local rights and remedies. It deals with *controversies within a suit* pending in a state court. Plaintiffs may sue jointly, severally, or in the alternative. The whole case is removable if in one suit in a state court a separable controversy, containing the requisites of federal jurisdiction, appears upon the face of the complaint. Such requisites are fixed and constant, but litigants may sometimes shape their complaint so as to fall within or without the orbit of federal jurisdiction; and it is always open to any defendant to show that parties or controversies have been fraudulently joined and should not be considered in determining the right to remove.

If, as we think, no rule of procedure requires this suit to be split into separate parts, let us see if federal jurisdictional limitations demand it; if so, procedural convenience must yield to jurisdictional necessity. The history of the present removal statute reveals the intention of Congress on the subject of splitting a suit into two parts, removing one and leaving the other in the state court. Though the ground of removal be a separable controversy within the suit, it is well settled that the effect of the removal is to take to the federal court not merely the controversy between citizens of different states, but the entire suit. The words of the statute are "may remove said suit into the district court"; and the entire suit goes to the federal court even though it contains a separable controversy which is wholly between citizens of the same state and which can be fully determined as between them.

The Supreme Court has never discussed the constitu-

tionality of the provision for removal of the entire suit, containing a controversy wholly between citizens of the same state, and the lower federal courts have touched on it in but few cases. From 1789 until 1866 the whole suit remained in the state court, even though it contained a separable controversy of the requisite jurisdictional amount wholly between citizens of different states, unless all of the defendants joined in the petition to remove and were citizens of different states from the plaintiff or all of the plaintiffs.

By the act of July 28, 1866, the said separable controversy was made a ground of removal by an alien or non-resident defendant, but without prejudice to the right of the plaintiff to proceed at the same time with the suit in the state court against the other defendants. Much confusion and embarrassment, as well as increase in the cost of litigation, resulted from this procedure in cases where, consistently within the rules of pleading, all of the controversies might conveniently have been disposed of in one suit. Thereupon, by the act of March 3, 1875, the prior statute was amended, and the provision for leaving part of the suit in the state court was omitted. Dealing with this clause, the court, in Barney v. Latham, supra, held that the intention of Congress to require removal of the whole suit was obvious, and said that otherwise it was difficult to perceive what purpose there was in omitting those portions of the act of 1866 leaving part of the case in the state court.

The act of 1887-1888 made no change with reference to removing the entire suit, but restricted the right of removal to one or more of the defendants actually interested in such separable controversy. These provisions have not been affected by subsequent legislation, and the law at the present time is that the entire suit is removable by one or more of

the defendants actually interested in such separable controversy.

Since courts are disinclined to adopt an interpretation of a statute that would extend its operation beyond what is warranted by the Constitution and the Supreme Court has uniformly construed this provision to authorize removal of the whole case to the federal court, by necessary implication it has held the provision in question to be constitutionally valid. Can these decisions "stand appeal to the Constitution and its historic purposes"? In quest of the answer to this question, we examine anew the constitutional power of Congress to provide for the removal of the whole suit, even though it contains a controversy that, by itself, could neither be brought in nor removed to the federal court.

The effect of Article 3 of the Constitution is not to vest jurisdiction in the inferior courts over cases and controversies designated therein, but to delimit those in respect of which Congress may confer jurisdiction upon such courts. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the particular instances, but it requires an act of Congress to confer it. The Congress may give, restrict, or withhold such jurisdiction as it sees fit, within the boundaries fixed by the Constitution, but it may not grant jurisdiction beyond those boundaries unless as a necessary incident to an effectual exercise of jurisdiction over the enumerated cases and controversies.

Diversity of citizenship has been a ground of jurisdiction in the lower federal courts from the foundation of the Government to the present time, but Congress has never undertaken to vest such courts with independent jurisdiction of controversies between citizens of the same state. The jurisdiction of merely local controversies that the federal district courts exercise in cases of removal on the ground

of separable controversies is a different class of jurisdiction from that ordinarily defined by the Constitution and statutes of the United States. It is of a class variously called ancillary, auxiliary, dependent, incidental, or supplementary. It is an extraordinary kind of ancillary jurisdiction in that it arises from an act of Congress expressly conferring it. Under the statute, it exists, not in its own right, but by virtue of its relation to a controversy of which the court is capable of receiving, and has been given, independent jurisdiction under the Constitution. It is analogous to such ancillary jurisdiction as is exercised by the courts by virtue of their inherent powers.

The economical and expeditious administration of justice often requires more than one controversy to be embraced in a single suit, regardless of the citizenship of the parties. Where one of such controversies would be removable to the federal court if separately brought in a state court, Congress has a reasonable range of legislative discretion to determine whether such suit, in its entirety, shall be left in the state court, removed to the federal court, or split into two parts. We have seen that this discretion was first exercised for 77 years by leaving the entire suit in the state court; that from 1866 to 1875 the suit was split into two parts, one part being left in the state court and the other removed to the federal court; and that, since the act of 1875, the entire suit has been removable to the federal court.

The reasons for granting, restricting, or withholding jurisdiction during the three periods mentioned were considerations for the practical judgment of Congress. That it was acting within the limits of its constitutional authority in granting to the lower federal courts both original and removal jurisdiction of controversies between citizens of different states is beyond question. The confusion, embarrassment, and increase in the cost of litigation, found to result

from the act of 1866 were sufficient grounds to warrant the enactment of the act of 1875, providing for the removal of the whole suit, thereby expressly conferring upon the federal courts ancillary or incidental jurisdiction to hear and determine a controversy between citizens of the same state.

As a court of equity never does things by halves but disposes of the whole case, once its jurisdiction has attached, the federal court, on removal, may constitutionally dispose of the whole suit if it contains a separable controversy wholly between citizens of different states that can be fully determined as between them. This ancillary jurisdiction, under legislative grant, obtains by virtue of the relation of the local controversy to the controversy between citizens of different states; and the amount involved, the citizenship of the parties, and the federal or non-federal character of the issues presented are immaterial.

Turning to the merits, we find no reversible error in the record. The verdict of the jury, which is supported by substantial evidence, establishes that Felt was an employee of Ray (for whom appellant was compensation insurance carrier) and was killed in the course of his employment. It also establishes the following facts:

The deceased met his death about 9:30 a. m. on Wednesday, September 9, 1943. No witness saw exactly what occurred, but Felt was found pinned beneath his overturned bulldozer on a roadway within the Galveston air base. The truck used to haul the bulldozer from place to place was nearby, with the loading ramp attached.

For several days prior to the accident, the bulldozer had been rented alternately by Randon Construction Company for work at the air base, and by Ray for work at Texas City, eight or nine miles away. Felt was hired to operate the machine when either used it, and he moved it from one job to the other as the demands of the users required. On Satur-

day and Monday preceding the accident, Felt operated the bulldozer for Ray at Texas City. On Tuesday morning, he assured Ray's agent that he would return for further work as soon as circumstances permitted, and transported the bulldozer to the Galveston air base where he operated it all that day. On Tuesady night, it rained heavily at Galveston, and Felt intended to operate the machine at Texas City on Wednesday if the ground was too wet for work at Galveston.

On Wednesday morning, he went to the air base and was informed that he would not be needed there for several days. He asked the witness Ross to go to Texas City and bring him back at noon to get his truck. He then proceeded, with the assistance of Ross, to start the motors of the truck and the bulldozer; after the motors were started, Ross left before the accident. The details of immediately succeeding events were not disclosed by the record, but in some manner the truck and bulldozer were moved a slight distance; and, within ten or fifteen minutes, Felt was found crushed beneath the bulldozer. The position of the truck, which had its ramp attached, as well as the time of the accident, indicated that Felt was trying to drive the bulldozer up the ramp and onto the truck when the bulldozer overturned. In furtherance of the plan, about an hour and a half later, Ross went to Texas City to keep his appointment, and there learned for the first time of Felt's death.

It was for the jury to draw all fair and reasonable inferences from the facts in evidence. It has done so and has found that Felt, from the moment he began to start the motors of the vehicle, was engaged in the performance of duties for and pursuant to his employment by Ray. The record also shows that Ray was obligated to pay rent for the bulldozer and wages to Felt from the moment he began the business of moving the bulldozer to Texas City

for work there; also that Ray had control over Felt's services and the power to discharge him at such time. Every normal characteristic of the employer-employee relationship was present.

The judgment appealed from is affirmed.